(4)

No. 92-2058

In The

Supreme Court of the United States

October Term, 1993

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent.

AND

PAUL J. FINAZZO, HOWARD E. OGDEN and HATSUO HONMA,

Petitioners,

v.

GRANT T. NORRIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of Hawaii

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

GOODSILL ANDERSON QUINN & STIFEL
KENNETH B. HIPP*
MARGARET C. JENKINS
JENNIFER C. CLARK
1099 Alakea Street
1800 Alii Place
Honolulu, Hawaii 96813
(808) 547-5600

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

I. THE FEDERAL QUESTION PRESENTED IN THE PETITION FOR CERTIORARI IS FINAL AND PROPERLY SUBJECT TO REVIEW

Respondent contends that this Court lacks jurisdiction to grant the Petition "because the Hawaii Supreme Court's judgments are not final judgments or decrees as required by 28 U.S.C. § 1257(a)." Brief in Opposition at 1. In *Cox Broadcasting Corporation v. Cohn* ("*Cox*"), 420 U.S. 469, 477 (1975), this Court dictated a flexible and pragmatic approach to the "finality" requirement of 28 U.S.C. § 1257. Under that approach, a state court's judgment may be "final" even if proceedings in the state court are anticipated following disposition of the petition. Under *Cox*, the cases discussed therein, and its progeny, the Hawaii Supreme Court's judgments are "final" within the meaning of 20 U.S.C. § 1257.

Under *Cox*, the finality requirement is met "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481. The Hawaii Supreme Court's decision is "final" under this holding, for if review of the preemption question is not permitted on the present record, the issue would evade federal review.

The Petition here presents the only meaningful opportunity for review of the Hawaii court's decision on preemption. If Petitioners lost at trial, under state law they would not be permitted to reopen the preemption issue in their appeal from proceedings on the merits. *See James W. Glover, Ltd. v. Fong*, 42 Haw. 560 (1958) (law of the case prevents reexamination of questions of law in subsequent appeals between the same parties absent compelling circumstances). In a subsequent appeal the

Hawaii Supreme Court would dismiss an appeal of the preemption ruling on the basis of law of the case and thus potentially create an independent state ground for decision precluding federal review. *See North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163-64 (1973) (finality found because state proceedings on remand could result in an independent state law ground for judgment against petitioner).

Cox also recognized the finality requirement would be deemed met where delay would result in serious erosion of federal policy or needless and wasteful litigation. 420 U.S at 482-83. Thus, in *Merchantile National Bank v. Langdeau*, 371 U.S. 555 (1963), the Court found that a state court's decision construing a venue statute to allow suit in its forum was "final" under Section 1257 because:

> We believe that it serves the policy underlying the requirements of finality in 28 USC § 1257 to determine now in which state court appellants may be tried rather than subjecting them, and appellee to long complex litigation which may all be for naught if consideration of the preliminary question is postponed until the conclusion of the proceedings.

371 U.S. at 558.

Similarly, in *Construction & General Laborers' Union, Local No. 438 v. Curry*, 371 U.S. 542 (1963), this Court permitted review of a state court's issuance of a preliminary injunction to consider the question of whether the matter at issue was committed to the exclusive jurisdiction of the National Labor Relations Board. The state court judgment was held to fall

> "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

371 U.S. at 519 (quoting from *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). Applying *Curry*, this Court later held that a state decision on the issue of federal preemption was final and subject to review under Section 1257. *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n. 5 (1983).

Respondent claims *Belknap* does not apply because reversal of the instant decision would not bring an end to all claims pending in state court. Brief in Opposition at 3 n.1. However, it is clear that, for this category of "finality" to apply, it is not necessary that the entire state proceeding be brought to an end. *Cox* makes clear that, in order to find a decision final under this approach, it need only be dispositive of the claims under review, not the entire suit. *See Cox*, 420 U.S. at 482-83 (finality found in those cases "where reversal of the state court on the federal issue would be preclusive of any further litigation *on the relevant cause of action* rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come") (emphasis supplied).

Under this Court's case law, and in light of the pragmatic concerns articulated in *Cox* and its related cases, the decision of the Hawaii Supreme Court finding no preemption meets the requirements for finality under 28 U.S.C. § 1257. The Petition here provides the only meaningful opportunity for review of the preemption finding, since it will not be subject to relitigation in any subsequent state proceeding and federal review could therefore be precluded. Moreover, even if post-trial review could be assured, it would be extremely wasteful of the very resources the RLA dispute resolution procedures and the accompanying RLA preemption doctrine were designed to conserve. Reversal of the Hawaii decision by

this Court would preclude further state litigation on the relevant causes of action and would place those claims squarely within the arbitral forum mandated by federal preemption law. Petitioners, therefore, respectfully submit that the interpretation of the finality requirement of 28 U.S.C. § 1257 in *Cox* and related cases requires the rejection of Respondent's jurisdictional argument and a finding that this Court does have jurisdiction under 28 U.S.C. § 1257.

II. RESPONDENT'S RELIANCE ON CONRAIL IS MISPLACED.

Respondent urges this Court to ignore the Hawaii Court's adoption and application of the preemption test from *Lingle v. Norge Division of Magic Chef, Inc.* (*"Lingle"*), 486 U.S. 399 (1988), to RLA preemption and instead to rewrite the Hawaii court's decision applying the "major dispute/minor dispute" test set forth in *Consolidated Rail Corp. v. Railway Labor Executives' Association* (*"Conrail"*), 491 U.S. 299 (1989). Brief in Opposition at 12-18.[1]

The first problem with Respondent's *Conrail* argument is that the *Conrail* test was not the test the Hawaii Supreme Court applied. Those looking to the Hawaii court for guidance and authority will find *Lingle's* preemption test, which focuses solely on the need for interpreting a collective bargaining agreement in a state court action, when Congress clearly intended for disputes arising out of the application of such agreements in the railroad and airline industries to be conclusively settled

[1] In briefing before the Hawaii Supreme Court, Respondent himself did not focus on *Conrail* and instead urged most strenuously that *Lingle* was the appropriate test.

by arbitration.[2] To argue against certiorari review of an incorrect decision because it could have been decided correctly on some unarticulated grounds is to miss the importance of this Court's guidance on matters demanding certiorari review. *Cf. United Airlines, Inc. v. Mahin*, 410 U.S. 623, 630-31 (1973) (possibility that state court might have reached the same conclusion if it had decided question of state law does not create an adequate and independent state law ground relieving the Court of the necessity of review where the state court opinion does in fact address and resolve a question of federal law).

The second problem with Respondent's reliance on *Conrail* is that the decision did not address the scope of RLA preemption and is therefore inapposite to the issue presented for review. The issue in *Conrail* was whether a particular dispute – indisputably within RLA jurisdiction – was "major" and thus required the maintenance of the status quo pending bargaining procedures, or "minor" and hence referable to arbitration. 491 U.S. at 307. There was no issue of RLA preemption because there was no question whether the dispute would be resolved through RLA procedures. The language and logic of *Conrail* were not intended by this court to address the question of whether congressional intent requires preemption of state laws attempting to regulate airline or railroad employment disputes. Indeed, the decision of the New Jersey Supreme Court in *Maher v. New Jersey Rail Transit Operations, Inc.* (*"Maher"*), 53 A.2d 750 (N.J. 1991), upon which

[2] *See* H.R. Rep. No. 1944, 73rd Cong. 2d Sess. 2-3 (1934) (RLA intended to provide sufficient and effective means for the settlement of minor disputes known as "grievances, which develop from the interpretation and/or application of the contracts between the labor unions and the carriers fixing wages and working conditions").

the Hawaii court so strongly relied (Petitioners' Appendix at 23a-26a), expressly held that, since *Conrail's* discussion of minor disputes was developed in another context, it is not appropriate to apply the *Conrail* test to resolve RLA preemption issues. 593 A.2d at 758.

Respondent's reliance on *Conrail* does serve to point to another split in decisions of a state supreme court and a federal circuit court concerning the scope of RLA preemption. *Maher* expressly rejects *Conrail* as the appropriate standard for RLA preemption. *Id.* at 758. On the other hand, *Davies v. American Airlines, Inc.*, 971 F.2d 463, 465-68 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993), applies the *Conrail* test and apparently holds that only those state claims falling within the "minor dispute" test of *Conrail* are preempted. A grant of this Petition would provide an appropriate opportunity for resolving the disagreement over proper application of this Court's decision in *Conrail*.

The Hawaii court primarily relied on *Conrail* for the purpose of implicitly rejecting the so-called "omitted case" doctrine as a basis for finding preemption. *See* Petitioners' Appendix at 20a (court notes that RLA "minor dispute" resolution procedure could be read to include disputes "arising outside a CBA" but holds that *Conrail* rejected any such reading). The omitted case doctrine, first articulated in *Elgin, Joliet & Erie Ry. v. Burley ("Burley")*, 325 U.S. 711 (1945), held that certain matters not expressly set forth in a collective bargaining agreement may nonetheless be held committed to arbitration as "minor disputes" under the RLA. Since the Court in *Burley* did not hold that the omitted case doctrine served to define the scope of RLA preemption the Hawaii court's implicit rejection of the doctrine in the context of RLA preemption is erroneous. Moreover, as the Air Transport

Association argues, Amicus Brief at 12-13, the Hawaii court's conclusion that the omitted case doctrine was eliminated by *Conrail* is certainly questionable. Moreover, this aspect of the Hawaii Court's decision is in square conflict with the United States Court of Appeals for the Fourth Circuit's decision in *Lorenz v. CSX Transp., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992), which relies on the omitted case doctrine to find RLA preemption.

At its foundation, Norris' argument that the wrongful discharge claims here are not preempted because they are not "minor disputes" under the *Conrail* test is based upon the faulty premise that RLA preemption applies only to "minor disputes." Assuming arguendo that Norris' wrongful discharge claims are not governed by the CBA, it can hardly be gainsaid that the grounds for terminating an employee are "mandatory" subjects of bargaining. *See Japan Airlines v. IAM*, 538 F.2d 46, 51-52 (2d Cir. 1976); *NLRB v. Worster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Accordingly, if Norris' discipline was not covered by the "minor dispute" procedures of the RLA, it would certainly be covered by the "major dispute" provisions, including the restoration of the status quo pending bargaining procedures. Therefore, regardless of whether Norris' termination presented a "major" or "minor" dispute, the procedures for resolving the dispute are dictated by the RLA, and state claims and fora cannot supplant those procedures.

Of course, the facts of the instant case show conclusively that the CBA does cover the subject matter of Norris' claim. Accordingly, although this Petition could provide an appropriate opportunity for the Court to consider whether the *Conrail* test and the omitted case doctrine impact upon RLA preemption, those questions are not essential to resolution of this claim, for they never

would have been reached if RLA preemption law had been properly applied by the Hawaii Supreme Court. The claims at issue here clearly turn on an application of the CBA, since the agreement by its express terms provides for signing off on work records, and conversely provides that an employee may not be disciplined for refusing to perform work in violation of health and safety, CBA, Art. IV & Art. XVII (Petitioners' Appendix at 49a, 60a-61a). The dispute at hand was therefore expressly committed to the arbitral process under the RLA.[3]

III. FEDERAL AND STATE COURTS HAVE REACHED INCONSISTENT DECISIONS ON RLA PREEMPTION AND WOULD CLEARLY BENEFIT FROM GUIDANCE AND CLARIFICATION BY THIS COURT.

Respondent argues that the result in the instant cases can be squared with the decisions in *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990), and the other cases discussed in the Petition. (Brief in Opposition at 19-23). In fact, the decisions cited with approval in the Petition depart from the Hawaii

---

[3] Respondent claims it would be inappropriate to resolve matters relating to public safety through arbitration. Brief in Opposition at 16-17. However, Congress and the federal courts have repeatedly signaled their approval of arbitral resolution of important policy matters; for example, claims involving safety issues or age, race or religious discrimination are subject to mandatory arbitration where the parties have expressly committed such matters to arbitration through collective bargaining or contracts governed by federal law. *See Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991); *Felt v. Atchison Topeka & Santa Fe Ry.*, Civ. No. 92-4217 (D.C. C. Calif. August 18, 1993); *Newtown v. Southern Pacific Transportation Co.*, 141 L.R.R.M. (BNA) 2477 (W.D. Tex. 1992).

court's decision in *Norris* in both reasoning and result. The Hawaii Supreme Court held that *Lingle* was the proper test for determining the scope of RLA preemption, following the New Jersey Supreme Court in *Maher v. New Jersey Rail Transit Operations, Inc.*, 593 A.2d 750 (N.J. 1991), and notwithstanding the Ninth Circuit Court of Appeal's decision in *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990), and other cases expressly holding that *Lingle* does not apply to RLA preemption.

Respondent does not attempt to square the reasoning and analysis of the Hawaii decision with *Grote;* in fact, he cannot do so. He instead attempts to distinguish the Hawaii decision from *Grote* on its facts alone. Brief in Opposition at 22-23. A review of the complaints filed by Norris in each of the Underlying suits demonstrates that he has failed at even this more modest task.

Count I of Norris' complaints against Hawaiian Airlines and the Individual Defendants was premised on the discipline he was subject to for failure to sign a work record as required by Article IV, ¶ D.4(a) of the CBA. No mention is made in Count I of the Complaints of any involvement by Norris with the FAA or any claim by Norris to his supervisors that the work involved violated federal aviation regulations. Instead the complaint stated a commonplace work dispute within the clear terms of the CBA: Norris' supervisors directed Norris to sign the work record for a tire replacement, but Norris refused claiming that the axle sleeve was unsafe and he had not performed the work covered by the record.

In *Grote* the employee's claim arose from discipline the employee received for failing to comply with a collective bargaining agreements requirement that the employee maintain a medical certification, and the

employee claimed he was terminated for refusing to give false medical information to the FAA. *Grote* is entirely analogous to Norris' claims in Count I of the complaints: in both cases the collective bargaining agreements required specific actions by the employee which the employee refused or failed to perform based upon alleged safety concerns. The split between the Ninth Circuit and the Hawaii Supreme Court is manifest, and Norris' attempted distinction of *Grote* only serves to heighten the confusion which will inevitably exist if the Hawaii Supreme Court's decision is allowed to stand.

IV. CONCLUSION

For the reasons set forth herein and in the Petition for Certiorari, this Court should grant the Petition, set aside the decision of the Hawaii Supreme Court, and uphold the trial court's finding dismissing Count I of the complaint against Hawaiian Airlines and Counts I and II of the complaint against Paul Finazzo, Howard Ogden and Hatsuo Honma.

Respectfully submitted,

KENNETH B. HIPP
MARGARET C. JENKINS
JENNIFER C. CLARK
GOODSILL ANDERSON QUINN & STIFEL
1099 Alakea Street, 1800 Alii Place
Honolulu, Hawaii 96813
(808) 547-5600

Counsel for Petitioner